UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 4:16-CR-00157-AGF (DDN)
	)	
MICHAEL H. LITZ,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFEDANT'S MOTION TO DISMSISS THE INDICTMENT FOR PREJUDICIAL PREINDICTMENT DELAY

Comes now the United States of America, by and through its attorneys, Carrie Costantin, Acting United States Attorney for the Eastern District of Missouri, and Gilbert C. Sison, Assistant United States Attorney for said District, and hereby submits the following response in opposition to Defendant Michael H. Litz's Motion to Dismiss the Indictment for Prejudicial Pre-indictment Delay (Doc. 120).

I. INTRODUCTION

A federal grand jury indicted Defendant Michael H. Litz ("Litz") in two counts of a three-count indictment on April 13, 2016. The indictment charged Litz with one count of bank fraud in violation of 18 U.S.C. §1344 and 2 and one count of bank theft, embezzlement or misapplication in violation of 18 U.S.C. §656 and 2. On January 31, 2017, a federal grand jury issued a superseding indictment in ten counts. The federal grand jury charged Litz with three additional counts of bank fraud, 2 additional counts of bank theft, embezzlement or misapplication and a conspiracy count.

Litz moves to dismiss the indictment on Fifth Amendment Due Process grounds due to pre-indictment delay. Litz alleges that his company, Bellington Realty ("Bellington"), purged many of the documents necessary for his defense in a March 2015 office move. Specifically, Litz alleges that management and payment records related to Excel Bank regarding transactions alleged in the indictment were destroyed due to the office move. Litz furthermore alleges that such information is not available through other means.

Litz's motion, however, should be denied because he has not satisfied the initial threshold burden of showing actual and substantial prejudice. Moreover, to the extent that Litz suffered any actionable prejudice at all, it was of his own making, as Litz was fully aware of the Government's investigation of him and his company at the time the documents were destroyed. Finally, Litz fails to mention, much less present any evidence or argument regarding the second element, which requires Litz to show that the delay was an intentional device designed to gain a tactical advantage over the accused. For these and the further reasons stated below, Litz's motion should be denied.

II. ARGUMENT

A. Litz has not satisfied the initial burden of showing actual and substantial prejudice, and such a showing must be established before the reasons for the Government's delay can be considered.

In order to succeed on his Due Process claim, Litz must first show that the pre-indictment delay "caused substantial prejudice to [his] rights to a fair trial." *United States v. Marion*, 404 U.S. 307, 324 (1971). The existence of prejudice is insufficient; rather, substantial prejudice must be shown. And, because the inquiry centers on a defendant's right to a fair trial, the question in each case is whether there has been a significant impairment of the defendant's ability to defend himself. *See United States v. Bartlett*, 794 F.2d 1285, 1292 (8th Cir. 1986). *See also United States v. Jackson*, 446 F.3d 847, 852 (8th Cir. 2006)(noting that the prejudice inquiry in pre-indictment delay cases is limited "to the effects of the delay on the defendant's ability to present an effective defense.").

As an initial point of analysis, the statute of limitations provides the primary basis for protecting a defendant against a lengthy delay in bringing criminal charges. *See United States v. Gouveia*, 467 U.S. 180, 192 (1984); *Bartlett*, 794 F.2d at 1289. Here, all of the crimes for which Litz stands accused fall squarely within the statute of limitations. Section 3293 provides that an indictment must be returned "within 10 years after the commission of [an] offense[]" involving a violation of or conspiracy to violate section 656 (theft, embezzlement or misapplication) or 1344 (bank fraud). 18 U.S.C. §3293. In the instant case, many of the operative facts, which form the basis of the charges against Litz occurred in 2009 and 2010. Thus, the earliest that the statute of limitations would have run for any of the counts would be 2019.

Because the charges against Litz were brought within the statute of limitations, Litz bears the burden of showing that the delay caused him "actual prejudice." *United States v. Hance*, 501 F.3d 900, 906 (8th Cir. 2007). Litz must discharge this burden first before the court will even inquire of the Government as to the reasons for the delay. *See, e.g.,United States v. Sturdy*, 207 F.3d 448, 452 (8th Cir. 2000)(stating that "[t]he court will inquire into the reasons for the delay only when actual prejudice has been established."); *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1998)(stating that "[o]nly where actual prejudice has been established will the court inquire into the reasons for the delay."). *See also United States v. Sprouts*, 282 F.3d 1037, 1041 (8th Cir. 2002)(noting that "[i]f the defendant fails to establish actual prejudice, we need not assess the government's rationale for the delay.").

In order to satisfy his burden of showing actual, substantial prejudice, Litz cannot rely on speculative or conclusory claims of possible prejudice . *See Sturdy*, 207 F.3d at 452. Rather, Litz must identify "specific, concrete and germane documents that were lost due to the delay." *Hance*, 501 F.3d at 906. And, not only must Litz identify such documents with specificity, he must also "relate the information contained in lost documents in sufficient detail to permit a court to access accurately whether the information is material to the accused's defense." *Bartlett*, 794

F.2d at 1290.

The failure to make such a particularized showing is sufficient to defeat the claim. For example, the Eighth Circuit refused to dismiss an indictment in similar circumstances in *United States v. McDougal*, 133 F.3d 1110 (8th Cir. 1998). In *McDougal*, the defendants were charged with wire, bank and mail fraud, aiding and abetting false statements to entries in the books and records of federal credit institutions, and aiding and abetting misapplication of small business investment funds. *Id.* at 1112. The defendants' activities arose out of various real estate dealings which took place in the mid 1980's and involved the Madison Guaranty Savings and Loan Association ("MGSL"). *Id.* The defendants were charged in a multi-count indictment in August 1995. *Id.* One of the defendants moved to dismiss the 1995 indictment due to pre-indictment delay. *Id.* The defendant argued that between 1986 and 1995, a key witness who was a U.S. Senator had died and the MGSL had closed, leaving its business files disorganized and scattered. *Id.* at 1113.

The Eighth Circuit, however, affirmed the district court's refusal to dismiss the indictment. *McDougal*, 133 F.3d at 1113. The Eighth Circuit reasoned that the defendant failed to relate the substance of the Senator's testimony and failed to identify any relevant documents that were lost or misplaced or the information contained in such documents. *Id.* As such, the court had no way of assessing how the Senator's testimony or the missing documents would have been relevant or beneficial to the defendant's case. *Id.* Thus, the defendant failed to carry his burden. *Id.*

This particularized showing is even required where evidence is presumably lost while in the Government's possession. For example, in *Jackson*, the defendant was involved in an online enticement investigation that occurred in July and August of 2001. 446 F.3d at 848. As part of that investigation, the defendant's computer was seized and the FBI retained custody of the computer. *Id.* The defendant requested the return of his computer in April 2002, but the request was denied because the investigation was ongoing, even though no further investigation appeared to occur after the FBI had seized the defendant's computer in August 2001. *Id.* Because of the retirement and reassignment of prosecutors to the case, the defendant was not indicted until February 2005. *Id.* at 849. The defendant moved to dismiss for pre-indictment delay alleging, among other things, that some of the files had been deleted from his computer while it was in the government's possession. *Id.* at 851.

The Eighth Circuit reversed the district court's dismissal of the indictment. *See Jackson*, 446 F.3d at 852. The Eighth Circuit noted that with respect to the missing computer files, the defendant failed to show with any specificity "any particular exculpatory computer file that may have been destroyed[.]" *Id.* at 851. Thus, the court reasoned that the defendant's Fifth Amendment Due Process claim was speculative and conclusory. *Id.*

B. Even if actual and substantial prejudice is established, Litz must demonstrate that the delay was an intentional device designed to gain a tactical advantage.

In his motion to dismiss, Litz fails to mention another element that he must prove to substantiate his Fifth Amendment Due Process claim. Litz must also show that the Government's delay in bringing criminal charges "was a deliberate device to gain an advantage over him." *Gouveia*, 467 U.S. at 192. To satisfy this element, a defendant must typically show "that the government acted intentionally to harass or to gain a tactical advantage[.]" *Benshop*, 138 F.3d at 1232-33.

Even where the government has destroyed evidence due to the passage of time, it is still insufficient to satisfy this element absent some intent to affect the defendant. For example, in *United States v. Davis*, 690 F.3d 912 (8th Cir. 2012), *rev'd on other grounds*, the defendant asserted that a delay of approximately eight years, which resulted in the destruction of surveillance videotape, constituted an unreasonable pre-indictment delay. *Id.* at 922. However, the Eighth

Circuit rejected the defendant's argument on this element because he failed to provide any probative evidence regarding the government's bad faith or intent to gain some tactical advantage. *Id.* at 923. Rather, the evidence showed that the agency in question destroyed the surveillance video pursuant to routine procedures, and not for the purpose of gaining an advantage over the defendant. *Id.*

Here, Litz will not be able to show bad faith or intent on the part of the Government. In fact, it was the defendant's own negligence that resulted in the destruction of the documents that he now seeks. As Litz acknowledges in his own motion, the Government initiated the investigation into his affairs on or about May 6, 2011. The Government served Litz with a grand jury subpoena for Bellington documents in December 2011. The focus of that investigation was Bellington and 18 Investment practices with respect to wrap around mortgages. There were news accounts of individuals claiming to be defrauded by these practices. Despite having knowledge of this investigation, Bellington proceeded with a document purge even though Litz knew that he and Bellington were under grand jury investigation. Furthermore, there is no evidence indicating that either Litz or Bellington were informed that the investigation had ceased or been closed. Under these circumstances, it is unreasonable for Litz to deflect the blame for destroying such documents on the Government.

C. Even if actual and substantial prejudice can be demonstrated, it must still be balanced against the reasons for the delay, and given the scope of the investigation and the complicated nature of the case, any such delay was more than reasonable.

The establishment of actual and substantial prejudice is a threshold inquiry because it demonstrates that a defendant's Due Process claim "is ripe for adjudication." *Lovasco*, 431 U.S. at 789. Thus, even if such prejudice is established, it does not mean that the defendant's claim is automatically valid. *Id.* Rather, the Due Process inquiry must consider the reasons for the delay. *Id.* at 790. And, such reasons must be balanced against any prejudice shown. *See Benshop*, 138

F.3d at 1232.

With respect to investigative delay, the Supreme Court has made clear that such delays do not deprive a defendant of Due Process. For example, the Supreme Court noted that a prosecutor has no duty to file charges as soon as probable cause exists. *See Lovasco*, 431 U.S. at 791. Rather, it is expected that a prosecutor will file charges only after he is able to establish a suspect's guilt beyond a reasonable doubt. *Id.* Moreover, the Supreme Court further noted that to require a prosecutor to file charges against one participant after proof has been developed against that participant would cause numerous problems. Such problems most notably include impairing the government's ability to bring charges against other individuals who may be involved in criminal activity. *Id.* at 793. Thus, the Supreme Court concluded that prosecuting a defendant following investigative delay does not deprive the defendant of due process, even if his defense has been compromised by the passage of time. *Id.* at 796.

Here, the investigative delay in this case is due to the scope of the investigation and the complicated nature of the case, which centers largely on Excel Bank. It should be noted that the initial investigation into these matters was conducted by the Federal Deposit Insurance Corporation ("FDIC"). As part of its functions, the FDIC conducted several civil examinations of Excel Bank because of its troubled status. Excel Bank failed in October 2012. Through their examinations, the FDIC initially uncovered evidence of wrongdoing that would later form the basis for the Government's indictment. Some of that evidence was set forth in memoranda calling for the removal of Shaun Hayes from banking activities. These memos were completed in 2013. Then, the FDIC considered the recommendation of criminal charges. The FDIC concluded the criminal phase of its investigation in March of 2014 and referred the case to the Government for prosecution at that time. The Government proceeded to indict Litz a little over two years after the case was formally referred to our office for prosecution.

At first, the focus of the investigation was on Michael Litz, Bellington and 18 Investment practices regarding wrap around mortgages. Later, the investigation turned more directly to banking-related activities. The FDIC criminal referral, followed by numerous witness interviews and a review of pertinent documents helped the Government uncover the roles of Michael Litz and Shaun Hayes in the transactions described in the criminal referral. With respect to the documents alone, the Government obtained more than 50 banker boxes of documents from various sources. Not included in that figure is the separate hard drive containing much of Excel Bank's files, emails and other relevant information. That drive alone consists of 237 gigabytes of information, which equates to 167,877 files. Further complicating the investigation is that many of the transactions, which form the basis of the indictment were not properly documented. Thus, the Government had to obtain documents from a variety of sources in order to get a complete picture of the charged transactions. The document intensive nature of the case alone justifies the delay in bringing the instant indictment, and is not unreasonable given the circumstances.

III. Conclusion

Litz must demonstrate that the evidence lost because of the Bellington document purge caused him actual and substantial prejudice. Here, Litz cannot satisfy this burden without identifying with specificity the documents lost and the contents of such documents. Absent such a showing, Litz's claim must be dismissed and there is no need to proceed with any further analysis. But, even if Litz could show some evidence of actual and substantial prejudice, Litz must still show that the Government acted intentionally to gain an advantage over him. Here, however, there were legitimate reasons for the pre-indictment delay given the scope of the investigation and the complicated nature of the case. Thus, absent any such evidence of intent or bad faith on the part of the Government, Litz's claim must fail for this reason as well.

Dated: May 1, 2017.

Respectfully submitted,

CARRIE COSTANTIN
Acting United States Attorney

s/ Gilbert C. Sison
JAMES E. CROWE, JR., #23196MO
GILBERT C. SISON, #52346MO
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, MO 63102
Telephone: (314) 539-2200
Facsimile: (314) 539-2020
E-mail: gilbert.sison@usdoj.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 4:16-CR-00157-AGF (DDN)
	)	
MICHAEL H. LITZ,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on May1, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following counsel of record:

Mr. Arthur S. Margulis – amargulis@capessokol.com
Mr. William S. Margulis – wmargulis@capessokol.com
Attorneys for Defendant, Michael H. Litz

s/ Gilbert C. Sison
JAMES E. CROWE, JR., #23196MO
GILBERT C. SISON, #52346MO
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, MO 63102
Telephone: (314) 539-2200
Facsimile: (314) 539-2020
E-mail: gilbert.sison@usdoj.gov